IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

J. G. BOGARD, *et al*,
Appellants,
vs.
F. H. SWEET, *et al*,
Appellees.

No. 156

BRIEF FOR APPELLANTS.

STATEMENT.

As a brief statement of the material facts disclosed by the record in the above entitled cause, we submit the following:

That on the 2nd day of August, 1900, H. C. Sweet, now deceased, commenced an action in the District Court of Greer County, Oklahoma, against appellants and others, to quiet his title to the following described tracts of land situated in said county, to-wit:

The southeast quarter of the southeast quarter of section twenty-seven (27), southwest quarter of the southwest quarter of section twenty-six (26), northeast quarter of the northeast quarter of section thirty-four (34), and the northwest quarter of the northwest quarter of section thirty-five (35), in township five (5) north of range twenty-two (22) west of the Indian Meridian; and

to cancel a warranty deed for the same tracts under a different description, conveying title to appellants and various other parties therein named as grantees, signed by said H. C. Sweet and his wife, Anna Sweet, on the 10th day of December, 1890, and acknowledged by them on the 10th day of February, 1891, and duly filed for record on June 24, 1891, at 4 o'clock p. m. in the office of the county clerk of Greer county, and recorded on the same date in Volume 2, pp. 308-9 of the deeds records of said county (R., pp. 9-16.)

The petition filed by the said H. C. Sweet contains two counts, the first alleging, among other things, that on the 13th day of October, 1898, he received a patent from the government of United States, conveying to him the tracts of land hereinbefore described, also, "That on or about the said —— day of December, 1890, this plaintiff prepared and, at some time not later than about the 10th day of February next thereafter made, executed and delivered to the aforesaid members of the aforesaid Mangum Star Printing and Publishing Association his certain deed and instrument in writing, a true copy of which is hereto attached and marked "Exhibit A," and hereby made a part of this petition," and that the land described in said deed, together with the excepted lots and parcels therein named, "is the same land as that described hereinabove as contained in the patent of the Government of the United States to this plaintiff, dated October 13, 1898." (R. p. 10.)

As "Exhibit B" to said petition, is also set out an instrument executed by the parties named as grantees in said deed, stating, among other things, "that whereas the said H. C. Sweet and wife on the 10th day of December, 1890, did execute and deliver their warranty deed to us for the town lots in said deed described, situated in the town of Mangum, Greer County, Texas, and accurately described in said deed, which deed is recorded in Volume 2, pp. 308-9 Deed Record of Greer County, Texas, * * * now, therefore, in consideration of said conveyance of said town lots by said H. C. Sweet and wife, Anna Sweet, and other valuable considerations to us paid, we hereby bind ourselves, the grantees in said

deed, our heirs and assigns and legal representatives to use reasonable diligence to sell said lots and collect payments therefor and to pay over to H. C. Sweet and wife, Anna Sweet, two-thirds of the gross receipts in cash received and collected on all sales of said lots as soon as collected."

The principal grounds alleged in the first count of plaintiff's petition as reasons for the cancellation of said deed are: first, the failure of the grantees to pay or perform the consideration agreed upon in the written contract (Exhibit B), and, second, that subsequent to the execution and recording of said deed there was an oral understanding between the grantor and the grantees therein to the effect "that the transaction of making and delivering said deed and said contract, as aforesaid, was and should be rescinded and vacated." (R. pp. 11-12.)

In this connection we call special attention to the fact that the petition contains no allegation to the effect that the execution of said deed was procured by any fraudulent representations made by any of the grantees therein named, or by any other deceit practiced by said grantees, or any one else. Nor does said petition contain any allegation charging that the deed was executed by reason of any mistake, oversight, or misapprehension on the part of the grantor. The deed itself recites a consideration of $10.00, the receipt of which is duly acknowledged by the grantors therein named. (R. p. 14.)

In the second count or cause of action the said H. C. Sweet, alleges, in substance, that, at the time of the execution of the warranty deed referred to and set out as a part of the first count, he had no title to the land described in said deed and that his after acquired title by patent from the United States under what is designated as the Additional Land or Purchase clause of an Act of Congress providing for the disposition of lands contained in Greer County, Oklahoma, formerly Greer County, Texas, did not inure to the benefit of his grantees in the previous deed, and that, for this additional reason, said deed should be decreed null and

void. (R. pp. 12-13.) To this count, or cause of action, a general demurrer was sustained by the trial court and, while counsel for the heirs of said H. C. Sweet excepted to this ruling, no cross errors were assigned to the Supreme Court of Oklahoma Territory, and said ruling was permitted to become final. (R. pp. 22-23.)

A number of the parties defendant in said action; other than appellants, filed disclaimers of "any right, title or interest whatever in or to any of the * * * lands * * * described in plaintiff's petition." (R. pp. 18-22). Thereafter, and on May 10, 1901, the suggestion of the death of H. C. Sweet, together with a motion that the action be revived in the names of J. L. Sweet, Leona S. Hurd, Lucy S. Wilson, F. H. Sweet, A. W. Putnam, guardian of the estates of Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet and Emery Sweet, minors and heirs of H. C. Sweet, deceased, was filed. (R. p. 23.) This application was granted on the same date.

Thereafter, and on the 3rd day of June, 1901, and after the demurrer of appellants had been overruled to the first count or cause of action contained in said petition, (R. p. 23) by leave of court appellants filed their answer in said cause, admitting the execution of the warranty deed set out as "Exhibit A" of plaintiff's petition and the written contract set out as "Exhibit B" thereof, and that the said H. C. Sweet received a patent for the tracts of land described in said petition on October 13, 1898, as therein alleged, denying each and every other allegation contained in the first count of said petition and specifically denying "that the deed from said H. C. Sweet and Anna Sweet so made and executed to them and other defendants named in said petition was without consideration, but, on the contrary," stating, "that same was executed for a good and valuable consideration;" and praying that judgment be rendered against plaintiffs, quieting and confirming the title to the tracts of land described in said petition in appellants and for all other just and equitable relief. (R. p. 24.)

Thereafter, and on the 17th and 18th days of August, 1903, said cause was tried to the court the undisputed evidence showing,

among other things, that the grantees in said deed tried in good faith to sell the lots thereby conveyed to them by advertising same for sale in a newspaper which they had purchased as a part of the real consideration for the execution of said deed, and that (at least) a portion of the sum of $10.00 stated therein as the consideration for the execution thereof, was paid to the grantors named therein. (R. pp. 26-55.) At the commencement of said trial and after the first question had been propounded to the first witness produced on behalf of appellees, counsel for appellants objected to the introduction of any testimony under the petition for the reason that it fails to state a cause of action (R. p. 26), and, at the conclusion of the testimony introduced on behalf of the appellees, said counsel interposed a demurrer to the evidence upon the ground that same fails to establish any cause of action against appellants, but, on the contrary, affirmatively shows that they are entitled to the relief prayed for in their answer. (R. p. 39.) At the conclusion of the trial, and after hearing all the evidence and the arguments of counsel thereon, the trial court found the issues in favor of appellees (R. p. 55), and, thereafter, and on the 21st day of August, 1903, appellants filed their motion for a new trial (R. p. 57), and, thereafter, and on the 16th day of October, 1903, said motion for a new trial was overruled by the trial court and final judgment rendered in favor of appellees cancelling said deed and quieting and confirming the title to the real property therein described, in appellees. (R. pp. 58-60.) From said judgment of the District Court of Greer County, Oklahoma, the cause was taken to the Supreme Court of the Territory of Oklahoma by petition in error, and case-made (R. pp. 7-8-60-61). Thereafter, and at the June Term, 1906, and on September 6, 1906, the Supreme Court of the Territory of Oklahoma handed down an opinion in said cause affirming the judgment of the trial court. (R. pp. 63-5.)

Such additional facts as are deemed material to the propositions urged as grounds for reversing the judgment of the court below are stated in the argument.

ASSIGNMENTS OF ERROR.

FIRST. The Supreme Court of Oklahoma Territory erred in holding and deciding that, by the terms of the deed and subsequent written contract, the grantees in the former were merely the agents of the grantor for the purpose of selling the real property therein described and without any beneficial interest in the property.

SECOND. The said court erred in holding and deciding that: "By this contract, the parties became his (grantor's) agents, and he was entitled to a re-conveyance of all the unsold property."

THIRD. The said court erred in holding and deciding in effect that the return of a warranty deed, duly executed and recorded, to the grantor by one of several grantees, upon the understanding between the grantor and such grantee that the grantees had failed to perform the things constituting the principal consideration for which the deed was executed, operated to revest the grantor with the equitable title to the land conveyed as against all the grantees.

FOURTH. The said court erred in holding and deciding that the grantor in a deed, executed without fraud, duress or mistake of fact, is entitled to a decree canceling same by merely showing a failure of consideration.

FIFTH. The said court erred in holding and deciding that the evidence in the case at bar shows a failure of the consideration for which said deed was executed as expressed therein and in the subsequent written contract.

SIXTH. The said court erred in not holding and deciding that the grantor in a deed is, in the absence of fraud, duress or mistake, estopped to deny the consideration expressed therein for the purpose of defeating the conveyance.

ARGUMENT.

I.

We will consider the first and second assignments of error together as each presents, in a different form, the fundamental error committed by the court below in holding that the warranty deed

and subsequent written contract did not vest any title to the land therein described in the grantees named in the former, but only constituted them agents of the grantor for the purpose of selling such land on commission. It would seem that a mere statement of this proposition suffices to show its fallacy. It is entirely clear that the grantees in said deed could have sold said land without regard to the wishes of said grantor as to the terms of sale, and conveyed as good a title as that previously possessed by him; whereas, "A real estate agent authorized to sell land has thereby no authority to execute a contract to sell." Carstens vs. McReavy, (Wash.) 25 Pac. 471.

> "A real estate broker, who has lands placed with him for sale, has no authority to receive money on the purchase price of such lands." Halsell vs. Renfrow, (Okla.) 78 Pac. 118.

See, also, to same effect, Keim vs. Lindley, (N. J.) 30 Atl. 1063.

How, then, can it be correctly held that no title to the land ever vested in these grantees? An examination of the authorities on questions of this character shows that the grantor, in every properly executed deed, parts with his title to the premises therein described but the question frequently arises as to whether or not the conditions expressed in a deed, or in a contemporaneous written contract, are such as to authorize the cancellation of the deed, at the election of the grantor, upon the failure of the grantee to perform said conditions. Rawson vs. Inhabitants of School District No. 5, 7 Allen (Mass.) 125; Horner vs. Chicago, Milwaukee & St. Paul Ry. Co. 38 Wis. 165, Bailey vs. County of Umatilla, (Or.) 13 Pac. 890.

It will be observed that the written contract (Exhibit B) contains no provision in any wise limiting the scope of the previous conveyance but, on the contrary, fully recognizes the fact that the title to the land described therein had been fully vested in the grantees therein named and recites that "in consideration of said conveyance, * * * and other valuable considerations" paid to said grantees, they bind themselves "to use reasonable diligence to

sell said lots," etc. This contract not only does not contain any condition subsequent upon the happening of which the previously executed deed might, at the election of the grantor, be deemed null and void, but does not even contain any words of limitation or restriction of the use which the grantees should make of the real property therein described except to require that they use reasonable diligence to sell same. The theory upon which the court below considered this contract as one creating the grantees named in said deed, mere agents of the grantor for the purpose of selling the various lots and parcels of land therein described, we are unable to determine, as it is not stated in the opinion handed down by said court.

A written instrument which not only empowers the parties therein named as grantees to convey a certain tract of land, "by good and sufficient deed," but also releases and quit-claims to them the title to such tract "is not a power of attorney, but vests the estate in the persons named." Burrow vs. Terre Haute & L. R. Co. (Ind.) 8 N. E. 167; See also, Rust vs. Goff (Mo.) 7 S. W. 418. Bortz vs. Bortz, 48 Pa. St. 382.

II.

There can be no question but that the third assignment of error is well taken and that the mere return, by one of the grantees of the previously duly executed and recorded deed to the grantor did not operate to revest him with the title to the real estate therein described, especially as against appellants, who never consented thereto, nor had any knowledge of the transaction.

Mr. R. C. Hanna, who returned said deed to the grantor upon his request, gives the following testimony on this point:

> "I had Mr. Sweet's deed in my possession until after the thing was dropped. He asked me for it and I gave it back to him after the thing had dropped out, just failed.. * * *
>
> Q. When Mr. Sweet asked you for the deed you did not consult any of the other members about it, just handed it to him?

A. Yes, sir. The thing had been disorganized for some time, the stock sold and I considered the transaction closed." (R. p. 33).

Mr. J. H. Simpson, one of the appellants, gives the following testimony on this point:

"Q. Did you authorize Mr. R. C. Hanna, or anybody else to make any recision of this contract and deed you had made with Mr. Sweet, or to return him the deed?

A. I did not.

Q. Did you at any time abandon or relinquish your interest in this real estate that had been conveyed to you?

A. No, sir." (R. p. 47.)

Mr. G. S. Huling, also, one of the appellants, gives the following testimony thereon:

"Q. As a member of that company did you ever, at any time, authorize Mr. Hanna to make recision of this contract and deed with Mr. Sweet or return him the deed?

A. No, sir." (R. p. 50).

However, the rule is well settled that "The return to the grantor or destruction of a deed to lands, will not revest the grantor with the title; the title to lands can be transferred only by deed." Jackson vs. Anderson, 4 Wend. (N. Y.) 474; See also, Jackson vs. Page, *Ibid*, 585; Marshall vs. Fisk, 6 Mass. 24; Botsford vs. Morehouse, 4 Conn., 550; Gilbert vs. Bulkley, 5 Conn., 262.

III.

In support of the fourth and sixth assignments of error, which we shall consider together, we most earnestly insist that the authorities on the question are well nigh, if not quite, uniform to the effect that the mere failure of the consideration named in a deed cannot be shown for the purpose of defeating the conveyance.

Jones on the Law of Real Property in Conveyancing, Secs 300-302;
3 Washburn on Real Property, 614.
6 Am. & Eng. Enc. L. (2nd ed.) 761;
McCalle vs. Bane, 45 Fed. 828;
Omar vs. Boyer, (Ala.) 7 So. 663;
Coles vs. Soulsby, 21 Cal. 47;
Hartman vs. Reed, 50 Cal. 485;

Lawrence vs. Gayetty (Cal.) 20 Pac. 382;
Feeney vs. Howard, (Cal.) 21 Pac. 984;
Downing vs. Rademacher, (Cal.) 62 Pac. 1055;
Beldon vs. Seymour, 8 Conn. 304;
Bever vs. North, (Ind.) 8 N. E. 576 (578);
Adams vs. Watkins, (Mich.) 61 N. W. 774;
Bobb vs. Bobb (Mo.) 4 S. W. 512;
McRae vs. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103;
Morse vs. Shattuck, 4 N. H. 229;
Sturtevant vs. Sturtevant, 20 N. Y. 39;
Vail vs. McMillain, 17 O. St. 617 (623);
Finlayson vs. Finlayson (Or.) 21 Pac. 57;
Hannan vs. Oxley, 23 Wis. 519.

In McRae vs. Purmort *supra*, it is held that:

> "Parol evidence is admissable to explain the consideration clause in a deed in all cases except for the purpose of showing that the deed was without consideration and thereby defeating or avoiding it."

In Omar vs. Boyer, *supra*, it is held that:

> "The recital of a valuable consideration in a deed although nominal estops the grantor and those claiming under him from alleging that it was executed without any consideration."

In Bobb vs. Bobb, *supra*, it is held that:

> "A want of consideration cannot be shown, against the recital in a deed, for the purpose of defeating the operative words of the deed, as for the purpose of showing a resulting trust in the grantor."

In Morse vs. Shattuck, and Bever vs. North, *supra*, the following rule is laid down:

> "It is perfectly well settled that the consideration expressed in a deed cannot be disproved for the purpose of defeating a conveyance, unless it be on the ground of fraud."

In Feeney vs. Howard, *supra*, it is held that:

> "A grantor conveying land by deed, reciting a valuable consideration, in the absence of actual or constructive fraud, accident or mistake, cannot show by parol that no consideration passed, and that the conveyance was made in trust, the grantee agreeing to re-convey upon request."

In Lawrence vs. Gayetty, *supra*, it is held that:

> "Where a deed conveying an undivided interest in land is executed in consideration of the grantees' oral promises to make certain improvements on the land, and do certain other acts in the future, and their performance is not made a condition subsequent, a mere failure to perform on the part of the grantees does not constitute a failure of consideration so as to entitle the grantor to rescind under Civil Code Cal. Section 1689."

In the opinion delivered in said case, the Supreme Court of California say, on this question, that:

> "Counsel for respondent rely upon section 1689 of the Civil Code. In our judgment the section referred to has no application to a case like this, where the vendor has waived actual performance on the part of the vendee, by relying upon his mere promise to perform, and, relying upon such promise to perform in the future, has executed the conveyance, thereby vesting the title to the property in his grantee. The contract on the part of the vendor is wholly executed * * *
>
> Leaving out of sight the question of fraud, which, as we have seen, was found against the respondent by the court below, the case cited and the one before us are identical in principle. Such a rule may work hardship in individual cases, and this may be one of those cases, but to hold that a vendee of real estate could, for a failure to pay the purchase money, repudiate his deed, and recover the land, would render real estate titles dangerously uncertain, and result in the most serious consequences."

It will be observed that the grantee in the deed under consideration in the case last quoted from was to do certain work in connection with the land, to-wit; make certain improvements thereon for the undivided one-half interest therein conveyed to him by the deed, which he failed to perform. In the case at bar, the grantees in the deed in question, even considering the subsequent contract as an integral part thereof, only agreed to use reasonable diligence to perform certain things in connection with the lands therein described.

We, also, regard the case of Downing vs. Radmacher, *supra*, (62 Pac. 1055) as being squarely in point upon the question under

consideration in the case at bar and as fully sustaining our contention on behalf of appellants. It is there held, among other things, that:

> "Where an undivided interest in a mining claim is conveyed in consideration of grantee's agreement to work the mine and deliver one-third of the minerals to defendant, and do certain other acts in the future, their performance not being made a condition subsequent, a mere failure to perform on the part of grantee does not constitute a failure of consideration, so as to warrant the cancellation of the deed."

In the body of the opinion handed down in said case the Supreme Court of California further say, in part:

> "Doubtless Rademacher expected that Downing would go forward and operate the mine for their mutual benefit, and no doubt his expectation in this regard formed part of the consideration, and the chief consideration in his mind for making the deed. Nevertheless, he exacted no promise, and none was made, that the deed should be inoperative if Downing failed to perform. In the matter of working the mine Rademacher trusted Downing, and he did not convey, or contract to convey to Downing upon condition that Downing would perform. Neither did he impose any condition in the deed or in the contract tending to show that a compliance on Downing's part was regarded as a condition subsequent, or that Downing's failure to perform should affect the title conveyed to Downing. * * * In the present case, Rademacher is asking the court to cancel the deed, or, if that cannot be done, then to require Downing to perform as a condition on which his title will be quieted. Clearly we cannot cancel the deed, there being no fraud in procuring its execution. * * * Shorn of this question of fraud, the case presents at most a failure of consideration; and upon principle, it is immaterial that the consideration took the shape of an agreement to work the mine and pay Rademacher a share of the proceeds rather than an agreement to pay a given sum of money, for which Downing had given his promissory note. But, had the consideration been a promise to pay money, no one would contend that simply upon a failure by the vendee to pay the purchase money, the vendor could have his deed cancelled."

The argument just quoted can, with equal force, be applied to the question under consideration in the case at bar, wherein

the promise of the grantees, as contained in a written contract, even conceding the claim that it was executed contemporaneously with the deed and as a part of the same transaction, is to perform certain acts in connection with the property conveyed, or rather to use reasonable diligence to perform these acts, to-wit: procure purchasers for, sell and convey the lots described in the deed and account to the grantor for a portion of the proceeds thus derived.

In the recent case of Calkins vs. Calkins, (Ill.) 77 N. E. 103, the rule for which we are contending is stated in the following language, to-wit:

> "In the absence of fraud, failure to pay the consideration expressed in the deed, is not cause for avoiding or cancelling it."

In Brand vs. Power, (Ga.) 36 S. E. 53, the rule is laid down as follows:

> "An absolute deed of conveyance will not, at the instance of the grantor, be cancelled merely because of a breach by the grantee of the promise made by him in consideration of which the deed was executed."

In Brown vs. Brown, (S. C.) 22 S. E. 412, it is held that:

> "A grantor cannot impeach his deed on the sole ground that it was without consideration."

It will be observed that all the testimony introduced on behalf of plaintiffs in the trial court, in the attempt to show a different consideration from that expressed in the deed and that same subsequently failed, went in over the objections of counsel for defendants in said court, and to the rulings of the court, admitting same, proper exceptions were saved (R. pp. 26-38), and that, upon the conclusion of the evidence on behalf of said plaintiffs, defendants interposed a demurrer thereto which was overruled and exception duly taken. (R. p. 39.)

We submit that these rulings of the trial court are clearly erroneous, and that the court below erred in not so holding. See Finlayson vs. Finlayson, *supra*, (21 Pac. 57), wherein it is held that:

> "A deed to real property cannot be invalidated by parol evidence showing that there was no consideration for its execution, when it contains a recital that a consideration has been received by the grantor; nor can it be shown by such evidence that the object or purpose of the deed duly delivered to the grantee was different from that implied by its terms,—unless executed to secure the payment of a debt, or the performance of some other act."

See, also, Bever vs. North, *supra*, (8 N. E. 576).

IV.

In support of the fifth assignment of error, we merely call special attention to the fact that the undisputed evidence in the case at bar shows the payment, in part at least, of the consideration expressed in the deed itself, and the performance of the provision of the subsequent written contract, which is claimed to constitute an additional consideration for the execution of said deed. Bearing in mind that this provision of the contract only requires that the grantees in said deed shall "use reasonable diligence to sell said lots and collect payments therefor," etc. (R. p. 16.) we submit that the evidence given by the witnesses introduced by the plaintiffs in the trial court makes a clear case of performance. For instance, Mr. Hannah, who claims to have returned the deed to the grantor, considering the undertaking for which it was executed had been abandoned, says, in answer to a question as to what the grantees did under the contract: "We tried to do something, but never did" (R. p. 32), and further testifies that "We advertised them (the lots described in said deed) in the papers in the usual way." (R. p. 33.)

Mr. S. H. Tittle, another witness for plaintiffs, testifies that, "The lots were advertised through the papers and they tried to collect something on the notes but failed." (R. p. 35.) Mr. H. M. Ferguson, another such witness, testifies as follows:

> "Q. State what was done, if anything, under that contract?
>
> A. Nothing to my knowledge. Something concerning

titles to land and records were not allowed to be made. * * *

Q. You advertised this property for sale?

A. Yes, sir.

Q. This notice came from the State officers?

A. It came from the State officers to County officers. * * *

Q. You did advertise this property for sale?

A. Yes, sir. I think a short time after we bought the stock." (R. pp. 36-37.)

To the effect that a portion, at least, of the sum of ten dollars expressed in the deed as the consideration therefor, was actually paid, see the testimony given on behalf of defendants in the trial court by Messrs. Edwards, Simpson and Huling (which said testimony is nowhere contradicted) on pages 40, 41, 46 and 51.

These witnesses further testify, and this testimony is also practically undisputed, that the inducement for their purchasing interests in "The Mangum Star," a newspaper plant then located in the town of Mangum, but whose owner was proposing either to sell same or move it from said town, was the proposition of the grantor in said deed to convey the real estate therein described to the grantees, under the conditions stated in said subsequent written contract. (R. pp. 41, 42, 46, 47 and 50.) It is not pretended that the grantor in said deed, or his heirs who were after his death substituted as plaintiffs in the trial court, ever tendered back any of the consideration received, or made any offer of any kind to place the grantees in *statu quo*.

All the foregoing propositions were urged to the court below and are practically disposed of by the following concise (if not very convincing) statements contained in the opinion handed down, to-wit:

> "Very elaborate briefs have been filed, and the case has been argued upon numerous different grounds, many of which we think have no application to the facts in the case, or to any rule that should govern the court in a decision. In fact, many of the questions argued have served only to confuse the court in arriving at the real contention in the case." (R. p. 64.)

This method of disposing of the contentions of parties is doubtless a rather convenient one for appellate courts, though certainly more or less unsatisfactory to the parties making the contentions.

The Supreme Court of the Territory of Oklahoma further says, in its opinion, that:

> "The evidence abundantly shows that Sweet's purpose in making the contract was to aid in the upbuilding and advertising of the town generally and the printing of a newspaper." (R. p. 64.)

We can safely concede this, since the evidence also abundantly shows that the grantees in the deed executed by Sweet and wife did these very things. They purchased the plant, printed the paper and advertised the town generally, in addition to advertising for sale the particular lots conveyed to them. (R. pp. 40, 41, 42, 45, 47, 50.) The performance of what the grantor contracted for as the consideration for this conveyance is hardly sufficient reason for setting same aside and revesting him with title to the lands conveyed.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the court below should be reversed and the cause remanded with directions to the Oklahoma Supreme Court to render judgment quieting and confirming title to the lands in question, in appellants.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
For Appellants.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

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vs.

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REPLY BRIEF FOR APPELLANTS.

JOHN W. SHARTEL,
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(20,461.)

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REPLY BRIEF FOR APPELLANTS.

Counsel for appellees has filed herein two briefs, called the main and supplemental briefs, the last making several corrections of statements and citations contained in the first, and both, especially the first, containing some statements of fact not shown by the record, to some of which misstatements special attention will hereinafter be called. While conceding most of the positions taken by us in our original brief for appellants, said counsel still endeavors to support the decision of the court below upon several grounds, which may be summarized as follows:

First. Upon the theory that the deed was so defectively executed as not to vest title in the grantees therein named.

Second. Upon the theory that, being thus defectively executed, the alleged failure of the grantees to perform the actual consideration for which same was executed, coupled with the return of the deed to the grantor by one of the grantees, revested the title in the former.

Third. Upon the theory that, considering the deed and subsequent written contract together, it is shown that the grantees were merely agents of the grantor to sell the real property described in such deed, and, upon their failure to sell, the title thereto revested in the grantor, this being the theory first advanced by the Oklahoma Supreme Court and the ground upon which its opinion is based.

Fourth. Upon the theory that the subsequent written contract between the grantees and grantor in said deed, together with the verbal understanding between them, creates a resulting trust in favor of the latter. While this theory was neither pleaded by appellees nor urged by their counsel in either of the lower courts, it appears to be the principal one insisted upon in this court.

We shall consider the foregoing propositions in the order stated.

I.

The first contention is effectively answered by the following allegations contained in the petition, to wit:

> "That on or about the said — day of December, 1890, this plaintiff prepared, and, at some time not later than about the 10th day of February next thereafter, made, executed, and delivered to the aforesaid members of the aforesaid Mangum Star Printing and Publishing Association his certain deed and instrument in writing, a true copy of which is hereto attached and marked 'Exhibit A' and hereby made a part of this petition. * * *
>
> "That the said deed of this plaintiff was made by him to the said parties named without any consideration whatever being paid by the said parties to this plaintiff, and was made solely for the purpose of inducing, causing, and empowering said parties to sell and convey said land in accordance with a certain contract in writing made, executed,

and delivered by said parties and one E. R. Claunch to this plaintiff at the same time that he made, executed, and delivered to them the aforesaid deed," etc.
* * *

"That after the execution of said deed it was, on the 24th day of June, 1891, filed in the office of the county clerk of Greer county, Texas, which then had jurisdiction over said Territory of Greer county, Oklahoma, and exercised official authority therein, and said office of county clerk was then the proper office in which to file said instrument to give record notice to the world of its existence" (R., 10, 11, and 12).

In the face of these affirmative allegations to the effect that said deed was fully and properly executed, delivered, and recorded, we hardly think appellees can now be heard to say that, by reason of fatal defects in the execution thereof, title to the real estate therein described never passed to the grantees. The most serious defect claimed, however, is that the acknowledgment to this deed is invalid because taken before one of the grantees. This position is untenable for three reasons:

(1) This point is not only not raised by any allegation of the petition, but specifically denied by several allegations contained therein.

(2) There is nothing in the record to show that the J. W. Logan who took the acknowledgment is the same J. W. Logan named as a grantee in the deed.

(3) Under both the Oklahoma and Texas statutes, a deed otherwise legally executed is valid between the parties thereto without being acknowledged.

Heintz *vs.* O'Donnell (Tex.), 42 S. W., 797.

Sec. 888, Okla. Rev. Stat., p. 326.

II.

While we regard the second contention of counsel for appellees as sufficiently answered in our original brief (pp. 8-9), especially in view of the fact that both the pleadings and the evidence show a properly executed and fully delivered deed, we call special attention to the following cases in addition to those cited in said original brief:

> "The destruction or cancellation of a deed after it has been delivered does not revest the title in the grantor, even if destroyed or canceled with the consent of all the parties for the express purpose of restoring the title to the grantor. The title cannot be restored otherwise than by a reconveyance in writing" (Cramner *vs.* Porter, 41 Cal., 462).
>
> See also Lawton *vs.* Gordon, 34 Cal., 36.
> Wilson *vs.* Hill, 13 N. J. Eq., 143.
> Souverbye *vs.* Arden, 1 Johns. Ch. (N. Y.), 240.
> Hollingsworth *vs.* Walker (Ala.), 13 So., 6.

There is no principle enunciated by any of the authorities cited by counsel for appellees applicable to the question under consideration or in conflict with the rule laid down in the foregoing cases, as the former refer to the return of unrecorded deeds upon oral agreements of rescission supported by valuable considerations. (See appellees' Main Brief, pp. 13-15.) In this connection we desire again to call special attention to the fact that the record in the case at bar contains nothing whatever tending to show that any of the appellants consented to the return of the deed to the grantor, or even had any knowledge of this fact, but, on the contrary, it is specifically shown that they did not authorize any one to return said deed, or to attempt to make any rescission of the contract and deed.

III.

Inasmuch as the agency and resulting trust theories are closely related, and as we feel that the former is fully answered in our original brief, pages 6-8, we shall here consider them together, or, rather, consider the agency theory as incidental or subsidiary to that of the resulting trust theory, conceding that they are not inconsistent with each other. In fact, however, the former is based on the assumption that complete title never vested in the grantees, whereas the latter recognizes the vesting of title therein, but only as trustees for the grantor.

As showing the correct classification of the various kinds of trusts, and as further showing that the grantees in the deed in question cannot be held to have received title to the property therein described as trustees for the grantor, we call special attention to the case of Gabert *vs.* Olcott (Tex.), 23 S. W., 985. The facts upon which the claim of a resulting trust was rested in that case are much stronger than those in the case at bar; but the Supreme Court of that State denied the application of such doctrine to the state of facts there disclosed, using, in part, the following language:

> "The first question arises upon the effect of the deed from the railroad company to Bishop Dubois. That conveyance purports to be in consideration of the sum of five dollars and grants the property to C. M. Dubois, Bishop of Galveston, and his successors in office, for the use of the Roman Catholic Church. The habendum clause is as follows: 'To have and to hold, all and singular, the premises above mentioned, unto the said C. M. Dubois, Bishop of Galveston, for the use aforesaid, and to his successors and assigns forever.' We are of the opinion that the grantee took under the deed a fee-simple title in trust for the benefit of the church, whose officer he was. There are no conditions subsequent expressed, and, although they may be implied, they are not favored in law.

> It may be that the consideration expressed should be deemed nominal, and that the conveyance should be treated as voluntary, and it is true that a condition will be more readily implied in a deed of that character than in one which rests upon a valuable consideration. Yet the rule is well recognized that the mere declaration of the uses to which the granted premises are to be applied do not ordinarily import a condition. * * * In the deed before us, the use of the word 'assigns' in the habendum indicates that it was contemplated that the trustee should have power to sell the lots, and thus to divert them to a purpose other than that primarily intended." (See also, specifically, Farnham *vs.* Thompson (Minn.), 26 N. W., 9, and cases therein cited.)

It is thus seen that a failure of the purpose for which real property may be conveyed does not create a resulting trust in favor of the grantor unless the deed of conveyance, or some other written instrument relating to the same transaction, contains an express provision to that effect. The deed in question in the case at bar is absolute in its terms, and the subsequent written contract contains no provision which can possibly be construed as creating a condition subsequent, but, on the contrary, fully recognizes the fact that the complete title had been vested in the grantees by the terms of the deed. The entire provisions of this contract, so far as they relate to the conveyance of the real estate described in the deed, are in the following language:

> "Know all men by these presents that whereas on the 10th day of December, 1890, H. C. Sweet and his wife, Anna Sweet, did execute and deliver their warranty deed to us for the town lots in said deed described, situated in the town of Mangum, Greer county, Texas, and accurately described in said deed, which deed is recorded in vol. 2, pp. 308-9, Deed Record of Greer County, Texas, and to which reference is hereby made for a more complete description of said town lots: Now, therefore, in consideration of said conveyance of said town lots by said H. C. Sweet

> and wife, Anna Sweet, and other valuable considerations to us paid, we hereby bind ourselves, the grantees in said deed, our heirs and assigns and legal representatives, to use reasonable diligence to sell said lots and to collect payments therefor and to pay over to H. C. Sweet and wife, Anna Sweet, two-thirds ($\frac{2}{3}$) of the gross receipts in cash received and collected on all sales of said lots as soon as collected."

That "a parol agreement by a grantee to reconvey real estate to his grantor is within the statute of frauds and does not create an express trust in such real estate in favor of the grantor" is ruled in the following cases:

Thomas *vs.* Thomas (Neb.), 67 N. W., 182; Dailey *vs.* Kinsler (Neb.), 47 N. W., 1045; Walker *vs.* Locke, 59 Mass. (5 Cush.), 90; Turner *vs.* Ogden, 66 U. S., 450; 17 L. Ed., 203; Stephenson *vs.* Crapnell (Ill.), 28 N. E., 379; Hasshagen *vs.* Hasshagen (Cal.), 22 Pac., 294; Burt *vs.* Wilson, 28 Cal., 632; Jones *vs.* Van Doren, 18 Fed., 619; Gee *vs.* Thrailkill, 45 Kan., 173.

In Turner *vs.* Ogden, *supra,* it is held that—

> "Agreement by parol that a title should be released cannot be made a substitute for a deed of release or surrender executed and recorded."

In Stephenson *vs.* Crapnell, *supra,* in addition to holding that a resulting trust cannot be created by parol, it is declared that—

> "Where there is an express trust, there cannot be a resulting or implied trust."

In Burt *vs.* Wilson, *supra,* it is further held that—

> "If the language of a deed is the language intended to be used by the grantor, his mistake as to the legal effect of the language used will not afford him any ground for relief in equity."

In Jones *vs.* Van Doren, *supra,* is found the following language:

> "The legal title confessedly passed by the quit-claim deed. * * * There is nothing in the deed from the mother to her son expressing any design or intention to grant anything different from what was conveyed, and this bill cannot be sustained, in my opinion, without overturning a rule of law and evidence established for the security of all property."

However, as shown in our original brief, there is no testimony in the case at bar even remotely tending to show any verbal agreement that title should revest in the grantor upon a failure of the grantees to perform the conditions of the written agreement. In fact, the entire theory upon which the case was tried and decided in the district court, on the part of the appellees, was that of a failure of the real consideration for which the deed was executed. The Supreme Court of Oklahoma affirmed the judgment of the trial court on the theory that the grantees in said deed were the mere agents of the grantor to sell the real estate therein described. Counsel for appellees now asks this court to affirm the decree of the Oklahoma Supreme Court on the theory that the provisions of the subsequent written contract, together with certain oral agreements between the grantor and grantees, created a resulting trust in favor of the former.

We may safely concede that the provisions of this written contract are sufficient to create an express trust; but it is not one falling within the class known as "resulting trust," where, upon the happening of certain contingencies, the title is to revest in the grantor.

In Beavers *vs.* McKinley (Kan.), 32 Pac., 363, it is held that—

> "B. conveyed 160 acres of land, which had been taken under the homestead law, to his minor son, at a time when he was not in debt, by a warranty deed,

in the usual form, with an habendum clause, for the expressed consideration of $1,000; and the son afterwards reconveyed the same land to his father, taking from the latter a note for $1,500, and the father afterwards mortgaged the land for a like sum to go into business. *Held,* that the conveyance from the father to the son was not in trust for the benefit of the former, and that the reconveyance from the son to the father was not made in pursuance of any trust. No implied trust can result in favor of the grantor in a deed from a father to a son, where such deed expresses a valuable consideration, and contains an habendum clause and the usual covenant of warranty."

In Ladd *vs.* Johnson (Or.), 49 Pac., 756, it is held that—

> "A declaration of trust executed by a solvent person contemporaneously with an absolute deed recited that whereas the maker was in a state of mortal illness, and desired to provide for the payment of his debts, he had conveyed his real estate to plaintiff in trust to pay his debts, with the desire to avoid proceedings in the courts; it being declared that the deed was a conveyance in trust, with full power to sell, the balance, after payment of debts, to be returned to the maker, his heirs, executors or assigns. *Held,* that the deed and agreement did not constitute a mortgage, but passed the absolute legal title to the land."

A part of the opinion of the court on this proposition reads as follows:

> "A mortgage or deed of trust in the nature of a mortgage is intended as security for the payment of money, or for the performance of some collateral act, and becomes void upon such payment, or performance, * * * while a deed of trust of the character under consideration here is an absolute and indefeasible conveyance of the whole of the grantor's title for the purpose expressed. The former, whatever the form of the instrument, or whatever name may be given it by the parties, creates a mere lien, while the latter conveys title. It is manifest from

> this distinction that the conveyance in controversy in this suit is not a mortgage or deed of trust in the nature of a mortgage, but an absolute conveyance of the legal title of the property in controversy to the plaintiff. It was not made as security for Johnson's debts, or for the performance of any other act by him. The intention of the parties, apparent upon the face of the instruments, was to vest the title absolutely in the grantee for the purposes of the trust. It was never contemplated that anything more than the surplus remaining after the payment of Johnson's debts should be returned to him. The deed is in the usual form, and, standing alone, certainly operates to convey title; and there is nothing in the declaration of trust to show the contrary. There is no statement that it was intended as a security for Johnson's debts, nor is there anything from which such an intention can be inferred. There is no contingency upon the happening of which the instrument shall be void or inoperative. There is no right of redemption remaining in Johnson" (p. 757).

We regard the reasoning of the court in the case last cited as conclusive against the contention of opposing counsel on the question under consideration, and it is not in conflict with the principles enunciated by most of the authorities cited by him. For instance, in the case of Flagg *vs.* Walker, 113 U. S., 659, we find the following declarations:

> "It must be conceded that, in accepting the conveyance of the property, Walker became a trustee to manage the property and pay off the debts of Flagg, according to the terms of the trust, and should be held liable for the faithful discharge of his trust. * * * In view of the declaration of trust made by Walker on April 12, 1875, it is clear that the transaction between Flagg and Walker was not a mortgage. A mortgage is a deed whereby one grants to another lands, upon condition that if the mortgagor shall pay a certain sum of money, or do some other act therein specified, at a day certain, the grant shall be void. * * * Walker was to reimburse

himself out of the property conveyed to him by Flagg, and the parties never contemplated a reconveyance by Walker to Flagg of the property in question. * * * It is the case of a trust. * * * The property was conveyed to Walker to dispose of at pleasure and according to his best judgment, and he was in all things to be the sole judge of the time and manner of using and disposing of said property. * * * There is no charge in the bill that he has abused that discretion or that neglect to sell at the present time would result in loss to the appellants."

In Wood *vs.* Perkins, 57 Fed., 258, also cited by counsel for appellees (Main Brief, p. 13), the action was brought to enforce a trust and not to rescind or set aside the conveyance. It is there said, among other things, that—

"The deed or deeds conveyed to the respondent, absolutely, whatever interest the grantors possessed. They were made on the strength of the written executory contract, which will be referred to again, and the parol agreement and understanding set out in the bill. * * * The instrument of conveyance was absolute on its face, while the duty imposed upon the respondent was partly by parol and partly by a separate written contract. All this created a strict trust such as the common law anciently took no notice of and such as included a *cestui que trust*, whose only remedy was by subpœna issued out of chancery. * * *

"The result is that the respondent, being strictly a trustee, in accordance with the arrangement which has been described, instead of performing his trust, violated it, and has received, in lieu of what he should have received under his trust, a sum of money as the proceeds of his tortious breach of duty. Upon fundamental principles of law, the grantors were entitled to proceed by bill against him, as an equitable tort-feasor, and claim the value of the interest which he unlawfully disposed of, or, at their option, to waive the tort and claim the proceeds, as they have done in the pending suit."

The case of Sanford *vs.* Sanford, 139 U. S., 642, has no application whatever to the question under consideration, merely holding that—

> "If one takes a title in his own name, whilst acting as agent, trustee or guardian, or in any other fiduciary capacity, a court of equity will, upon the showing of the fact in an appropriate proceeding, subject the land to proper trusts in his hands or compel him to transfer the title to the party equitably entitled to it."

Section 2437 of Wigmore on Evidence, cited on page 20 of appellee's main brief, declares the following rule, which we have no disposition to dispute, to wit:

> "When a document of transfer of property is absolute in its terms, may an extrinsic contemporary agreement to hold the property as security only be established? This question has generally been answered in the affirmative."

It is also suggested, rather than contended, on said page 20, Main Brief, that under article 272, title 12, Revised Statutes of Texas, 1879 (Art. 314, title 13, Sayle's Statutes of 1897), that a failure or partial failure of consideration may be shown to defeat the operation of a deed; but it is entirely clear that this section has no application to such an instrument, but only applies to bills, notes, and other similar written instruments, whereas the law applicable to conveyances is contained in title 19, Revised Statutes of 1879 (title 20, Sayle's Statutes of 1897). See also on this question Lawrence *vs.* Gayetty (Cal.), 20 Pac., 383.

IV.

In various portions of the two briefs filed by counsel for appellees some rather indefinite points are sought to be made against the validity of the deed in question on the grounds that the grantor had no title at the time of the

execution of same; that his after-acquired title was procured by patent from the United States, etc. It is a sufficient answer to all these to say that they are alleged in the second count or cause of action contained in the petition of appellees, to which a demurrer was sustained and no cross-errors assigned on said ruling (R., 12-13 and 23); hence none of these matters is before this court.

Aside from this, the title acquired by the grantor by patent from the United States was by purchase under the act of January 18, 1897, providing that "every such person (homesteader) shall also have the right, after six months, prior to all other persons, to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March sixteenth, eighteen hundred ninety-six, not exceeding one hundred sixty acres, which, prior to said date, shall have been cultivated, purchased or improved by him" (29 Stat., 490), and involves none of the questions applicable to an attempted alienation of a homestead prior to the issuance of patent therefor, and there is absolutely no reason why, in the case at bar, the after-acquired title of the grantor should not inure to the benefit of the grantees, as it is only because it is the declared "theory and policy of the homestead law that the homestead shall be for the exclusive benefit of the homesteader;" and, because "the homestead right cannot be perfected in case of alienation or contract for alienation without perjury by him," that it is held to be against public policy to permit a homesteader to alienate prior to the issuance of patent (Anderson *vs.* Carkins, 135 U. S., 483; 34 L. Ed., 272).

Except in cases involving the right to alienate homesteads, the law is well settled that—

> "Where one makes a deed to land covenanting therein that he is the owner and he subsequently acquires a new title, his new title inures to the benefit of his grantees" (Irvine *vs.* Irvine, 76 U. S., 617; 19 L. Ed., 800).

In the opinion of the court in the case last cited is found the following language:

> "But it is argued on behalf of plaintiff that the deed was inoperative, because it was forbidden by the twelfth section of the act of Congress of September 4, 1841, which granted pre-emption rights and enacted that any grant or conveyance made before the entry of the land shall be null and void, except in the hands of *bona fide* purchasers for a valuable consideration. To this it may be answered that neither that act nor the acts of May 29, 1830, and January 23, 1832, have any application to the present case. They relate to pre-emptive rights conferred upon actual settlers. The plaintiff did not enter the land in dispute under either of these, and no act of Congress deprived him of the power to sell and convey after he had made an entry and paid all the purchase-money, though before he had received his patent."

See also Moore *vs.* Crawford, 130 U. S., 122; 32 L. Ed., 878.

Van Rensselaer *vs.* Kearney, 11 Howard, 297; 13 L. Ed., 703.

Oklahoma Rev. St., Sec. 895, p. 327.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the court below should be reversed, with directions to enter a decree in favor of appellants.

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Attorneys for Appellants.

Office Supreme Court U. S.
FILED.
JAN 27 1908
JAMES H. McKENNEY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

J. G. BOGARD, et al,
Appellants,

vs.

F. H. SWEET, et al,
Appellees.

No. 156

BRIEF FOR APPELLEES

CHAS. M. THACKER,
For Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

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vs.

F. H. SWEET, et al,
Appellees.

No. 156

BRIEF FOR APPELLEES

STATEMENT.

"A concise statement, or abstract of the case, presenting succinctly the questions involved and the manner in which they are raised," is here a delicate and difficult undertaking, especially to one whose knowledge of the facts, as they should have been developed upon the trial of the case, is as full as my own, in view of the imperfect record, in which so much that should have been proven and made definite and certain is left to inference and conjecture, as the same, in respect to the facts, was actually made in the trial court, to say nothing of such other unsatisfactory features as minor errors or defects in the petition to the trial court and the apparent probability of a few minor and, I think, harmless

errors that have innocently crept into the record since the trial in the district court; but, being unable to fully concur in the conceptions of counsel for appellants in this regard and deeming a more extended statement of the allegations in said petition and of the facts proven essential to a correct understanding of the questions involved, I respectfully submit the following:

The history of the proceedings had in the case appear to be fully and accurately stated in the brief for appellants; but the issues made by the pleadings and the proven facts appear to be there too narrowly stated.

The petition of H. C. Sweet to the trial court, in substance, alleges, in its statement of the first cause of action, that the deed and contemporaneous written contract were prepared by the parties thereto on Dec. 10, 1890, and were delivered by their respective makers not later than Feb. 10, 1891, as one transaction; that Anna Sweet had no interest, except as wife of H. C. Sweet; that the deed was without any paid consideration, notwithstanding its recital of $10, and was made for the sole purpose of inducing, causing, and empowering the grantees therein to sell and convey the town lots therein described in accordance with said written contract, which required them to use reasonable diligence to sell and convey said lots and collect certain notes therein mentioned and to pay over to the grantors in the deed two-thirds of the gross receipts in cash from the sales of the lots and collections on the notes; that the remaining one-third of such receipts was to be retained by the grantees in the deed as compensation for their services in this regard; that the deed was made to the grantees as agents of the grantors to make such anticipated sales and collections; that the grantees in the deed wholly failed and refused to perform each and every portion of their promises and undertakings in this regard, and, in the spring or summer of 1891, returned and surrendered the notes to said H. C. Sweet, "and, as plaintiff

believes, said deed; but plaintiff, although he has made diligent search and inquiry for the same, has been and is unable to find or learn of the whereabouts of the same, the said deed, and he believes the same has been destroyed in his possession; that at the time said notes were returned and surrendered to plaintiff, and, as he believes, said deed, also, it was understood by and between all of the parties to said deed and to said contract in writing that said deed and said contract was then and there and should thereafter be of no force or effect, and that the transaction of making and delivering said deed and said contract, as aforesaid, was and should be rescinded and vacated;" and that the grant contained in said deed "never was accepted and the benefits thereof taken or the obligations performed on the part of the said grantees, and the uses and purposes of the said deed and the grant have long since wholly ceased in operation and effect."

The second cause of action stated in the petition is based mainly upon the invalid character of the deed; but the facts therein alleged, referring to the status of Greer County lands at the time of the making of the deed and contract, and to the groundless character of H. C. Sweet's claim of title to the town lots at the same time, are, in the main, such as the Court will, perhaps, find to be within its judicial knowledge and may be considered in connection with the first cause of action, although appellees reserved exception to the action of the trial court in sustaining demurrer to same.

The answer made by appellants is as stated in the brief for them; and the issue under the pleadings presented to the trial court and the supreme court of the Territory appear to require a consideration of the facts following:

On or immediately before Nov. 22, 1890, certain persons, including H. C. Sweet and twenty-one others, named in the petition to the trial court (R. p. 9), pur-

chased of Dawson a newspaper, known as the "Mangum Star," published in the town of Mangum, in Greer County, a county over which the State of Texas exercised a precarious jurisdiction until March 16, 1896, when this Court decided it was not a part of that State; and these purchasers are known throughout the record here as the "Mangum Star Printing and Publishing Association," a name adopted on or before Dec. 10, 1890, and an Association that contemplated incorporating under the laws of the State of Texas. (R. pp. 30, 54, and 26-55.)

On Dec. 10, 1890, H. C. Sweet, joined by his wife, signed the deed, the record of which constituted the cloud upon his title of which he complained in his petition to the trial court; and on Feb. 10, 1891, these makers acknowledged the deed before another member of the Association, J. W. Logan, County Clerk of Greer County, Texas (R. pp. 9-17, 30, 26-38, and 54-55); and simultaneously, as a part of the same transaction, the grantees in the deed obligated themselves to sell the town lots which the deed purported to convey and to pay over to H. C. Sweet two-thirds of the gross proceeds therefrom, retaining the remaining portion as their compensation for their services and agency in this regard, and to undertake the collection of certain notes for H. C. Sweet upon the same terms; and this obligation and undertaking of the grantees is embodied in a simultaneous written contract, to be considered as a part of the deed, which contract required the obligors to "use reasonable diligence to sell said lots and collect payment therefor, and to pay over to H. C. Sweet and wife, Anna Sweet, two-thirds of the gross receipts in cash received and collected on all sales of said lots as soon as collected," with a similar provision as to the collection of the notes. (R. pp. 16-17, contract, and 26-55, oral evidence.)

No part of the $10 consideration mentioned in the deed was actually paid. (R. pp. 30-31, 34 and 54, 36 and 55, 37, and 26-55 considered together.)

In the first and fourth enumerations of grantees in the deed, the first being in the acknowledgment of consideration clause and the fourth being in the warranty clause of the same, there are only seventeen names, including H. C. Sweet, the record showing only thirteen in the warranty clause; but in the second and third enumerations, the twenty-two names, including C. J. Edwards as the unnamed member of "F. B. Duke & Co.," are found.

The names that appear in the second and third and not in the first and fourth enumerations being those of J. A. Powers, G. S. Huling, E. A. Winkler and O. P. Elliott; and, as I did so with consent of counsel for appellants, in my brief in the Supreme Court of Oklahoma, I hope this Court will pardon me for going beyond the record here, only to the extent indicated by italics in this paragraph, to say in this connection that ***the deed has, at all times,*** since R. C. Hannah, the custodian member of said Association, surrendered it to H. C. Sweet within one year after its date (R. p. 33), ***been in the possession of H. C. Sweet and his heirs,*** in whose names this action was revived on May 10, 1901 (R. pp. 23-24), ***and shows that the names of J. A. Powers, G. S. Huling, E. A. Winkler and O. P. Elliott were originally written into the consideration and warranty clauses of the deed and afterwards cancelled,*** notwithstanding the fact that the same could not be found at the time of presenting the petition to the trial court.

The contract was signed by nineteen of the grantees named in the deed and by E. R. Launch, although the names of J. A. Powers, G. S. Huling and E. A. Winkler, as alleged in the petition to the trial court, were afterwards cancelled, so that only sixteen names remained to the contract. (R. pp. 16-17.)

The contract recites that the "deed is recorded in Vol. 2, pp. 308-9, deed records of Greer County, Texas"; but, in keeping with the unbusiness-like methods of the

parties throughout the entire imperfect transaction, this recital was evidently inserted after the deed was recorded on June 24, 1891; and, in view of the allegation in the petition to the trial court and the absence of evidence to the contrary, H. C. Sweet must not have known of its recordation until July, 1900, or, if he did, must have forgotten it.

At the time the deed and contract were made, the parties had agreed to incorporate under the laws of Texas, to take the town lots in question over to the corporation, and to transact the business of their agency under said deed and contract in the name of such corporation; but this was not done. (R. pp. 30-31.)

This written contract shows that the mutual profits, to H. C. Sweet, as owner, and to the grantees in the deed, as agents, anticipated from the sale of the lots by the latter was the purpose of the deed; and that there was no other consideration is shown by the testimony of G. H. Eubank (R. pp. 30-31), R. C. Hannah (R. pp. 34 and 54), H. M. Ferguson (R. pp. 36 and 55), O. P. Elliott (R. p. 27), and all the evidence in the case considered together (R. pp. 26-55); and the grantees took the deed merely as agents of the grantors. (R. p. 31.)

Each of the three appellants who testified upon the trial stated that he paid his portion of the $10, mentioned as the consideration in the deed; but two of them admitted that they paid their respective portions to the grantee, who took the acknowledgments of the makers of the deed, J. W. Logan, and not to either of these makers; and the third one was not asked if he had not also paid to Logan instead of to Sweet. (R. pp. 39-53.)

This controversy in regard to this deed arose about nine years after it had been surrendered to H. C. Sweet and at least eight years after the Association had been completely disorganized and the shares of its members sold to Eubank and Thacker (R. p. 48), during which intervening years H. C. Sweet, and, so far as the lots

were occupied by others than himself, claimants under him adverse to appellants had occupied the same without protest from either of appellants, who did not act during those years indicative of any bona fide claim of right under the deed; and this intervening time was sufficient to cause some confusion of subsequent events, including a contest in 1895 involving the question of the removal of the county seat, with the deed and contract transaction in the testimony adduced by the appellants. (R. pp. 26-55, 40, 49 and 50.)

Not only the deed (R. p. 33), but the notes taken for collection were returned to H. C. Sweet (R. pp. 30-31) and the entire imperfect and incomplete transaction had been rescinded by the parties thereto before the expiration of the first year next following its inception (R. pp. 31 and 33, and 26-38) and before the grantees had done any act of consequence under the deed and contract.

The title of H. C. Sweet to the land in question was acquired by him under act of Congress approved Jan. 18, 1897, allowing homesteaders in Greer County to take, in addition to the 160 acres that were free of charge, 160 acres "of which he was in actual possession on March 16, 1896," and it is matter for regret that the record does not fully disclose the facts in this regard; but the Court will, perhaps, take judicial knowledge that under the law and the Departmental rules and principles of procedure, to have secured the entry and patent, H. C. Sweet must have shown the General Land Office that on March 16, 1896, he was in actual possession of the entire tract, except in respect to specified lots occupied by specified persons who acquired possession from and under him or by wrongful intrusion upon his prior possession and who had specifically waived their right to enter the land for town purposes, and that a preliminary showing of such a state of facts must have been made in H. C. Sweet's application for entry, before the Depart-

ment ordered a publication of any notice to adverse claimants in this regard.

In a negative way, the evidence shows that the deed and the claims of appellants thereunder were in no wise involved or considered in the making of said entry by H. C. Sweet and its allowance by the Department, although one of the appellants testifies in a way that somewhat confuses the attitude of H. C. Sweet towards bona fide occupants and all who waived their rights in respect to making entry of the land for town purposes with his attitude towards appellants, but the fact that not one of the appellants demanded a deed of him after he acquired title by patent and that the witness, L. J. Edwards, one of the appellants, in testifying in this regard, said: "No, sir, he did not say anything about these particular lots," in answer to inquiry as to whether H. C. Sweet, in connection with his entry and acquisition of title, gave any assurance as to the claim under this deed (R. pp. 26-55 and 44), is brought to the attention of the Court in this connection.

At the date of the deed and contract and until H. C. Sweet obtained title by patent from the United States on Oct. 13, 1898, he had and could have had no right, title or interest, nor color thereof, touching any portion of these lots, whether this question be viewed from the standpoint of the United States or from that of the State of Texas in respect to the lands of Greer County at the time.

Only seven of the original twenty-two, including C. J. Edwards, who is not specifically named in the deed, of the grantees have made defense against this action, and two of these seven are not included in the warranty clause of the deed.

When this action was brought in the trial court, ~~eight~~ more of the original grantees promptly filed disclaimers herein (R. pp. 18-21), as did W. L. Pendergraft, as legal representative of I. L. Pendergraft, one of the three de-

ceased grantees, including C. J. Edwards, and one of the two whose heirs are making defense.

Except as the same may be at variance with the foregoing statement, the opening statement in brief for appellants appears to be correct, and reference is made to it to supply any omissions here.

ARGUMENT.

I.

Referring to first and second assignments of error and answering argument of counsel for appellants in support of same,

The case of Halsell v. Renfrow, cited and quoted by counsel for appellants as holding that:

"A real estate broker, who has lands placed with him for sale, has no authority to receive money on the purchase price of such lands,"

is, in effect, merely a decision that such broker, without having either the legal or equitable title, or the actual possession of the property, has no implied authority to collect the price for which he sells the lands of his principal; and it is not conceivable that counsel mean to contend that such authority may not be given without destroying the relationship of principal and agent between the parties, nor does the case cited bear upon any phase of any question involved here.

Agency is the relation, created by express or implied contract, or by law, whereby one party sui juris, called the principal, constituent, or employer, delegates the transaction of some lawful business, with more or less discretionary power, to another party, called the agent,

attorney, proxy, or delegate, who undertakes to manage the affair and render to him an account thereof. 1 Am. & Eng. Enc. L. (sec. ed.) 937-8.

Whether a contract is one of sale or merely creates an agency depends upon the intention of the parties as legally ascertained. One of the main tests applied is to inquire whether an option is given the transferee to pay for the goods and keep them. In such a case the transaction is a sale, and the title passes absolutely. 24 Am. & Eng. Enc. L. (sec. ed.) 1027-8.

See, also, Columbus Construction Company v. Crane Company, 52 Fed. Rep. 635, 9 U. S. App. 46.

That the principles to be applied in determining whether an agency and trust or seller and purchaser relationship is created are the same in respect to real as in respect to personal property is confidently assumed; and, it being clear that the grantees in the deed were in duty bound to obtain the highest possible prices for the lots in the open market and had no authority to fix for themselves a price and retain the lots at such price, it is certain that the deed and contract created some other relationship than that of vendor and vendee or of seller and purchaser.

In order to determine what was intended by a deed, separate and different instruments may be construed together, where they are executed at the same time or simultaneously, and relate to the same subject matter and are between the same parties, or are parts of the same transaction (13 Cyc. 614-615, citing numerous cases); and hereinafter the deed will frequently be mentioned alone as including the contract simultaneously executed by the grantees.

Although there is, in this deed, a suggestion of a partnership relation, a suggestion of an express trust, and a suggestion of a "condition subsequent," it appears

quite certain that the actual relationship, in the first instance, was that of principal and agent, with an express trust feature, followed by an implied or resulting trust in favor of the grantors upon the failure and refusal of the agents to sell the lots and their surrender of the deed to the grantors, if the deed was not void and incapable of creating any relationship whatever.

Assuming the validity of the deed for the purpose of the present argument only, the agent and trustee characters of the grantees appear to be clear in the light of the propositions and cases following:

When land has been conveyed by an absolute deed, the intention of the parties not being to confer on the grantee the beneficial interest, but merely to facilitate the accomplishment of some specific purpose, it has been held that the purpose of the conveyance may be shown by parol and thereby a resulting trust may be raised in favor of the grantor. 15 Am. & Eng. Enc. L. 127, citing Beadle v. Beadle, 2 McCrary (U. S.) 586; Pierson v. Pierson, 5 Del. Ch. 11; Rice v. Rice, 107 Mich. 241; Thompson v. Thompson, 30 Neb. 487; Stubblefield v. Stubblefield (Tex. Civ. App.), 45 S. W. 965; Wallace v. Lewis, 60 Tex. 247; and Reeves v. Bass, 39 Tex. 618.

A resulting trust may arise and result to the grantor, as stated by Judge A. C. Freeman in his notes to Neill v. Keese (Tex. 1849), 51 Am. Dec. 756-7, in either of the following cases:

"(1) When property is conveyed in trust for particular objects or purposes, which fail by lapse or otherwise, resulting trust will arise for the benefit of the grantor, if the property is not otherwise disposed of. 2 Pomroy's Eq. Jurisprudence, sec. 1032-3; 1 Perry on Trusts, sec. 160; 2 Story's Eq. Jurisprudence, sec. 1200, and cases cited: Ackoyd v. Smithson, 1 Bro. C. C. 503; Williams v. Coade, 10 Ves. 500; Crews v. Boyle, 3 P. Wms. 22; Spink v. Lewis, 3 Bro. C. C. 355; Davenport v. Coltman, 12 Sim. 610; Hutchinson v. Hammond, 3 Bro. C. C.

128; Hawley v. Jones, 5 Paige 318; Muckleston v. Brown, 6 Ves. 63; (2) When property has been granted in trust for some purpose which is illegal, as in contravention of some statute or policy of the law, the trust is void, and a resulting trust arises in favor of the grantor or his heirs. Carrick v. Errington, 2 P. Wms. 361; Pilkington v. Broughey, 12 Sim. 114; Turner v. Russell, 10 Hare 204; Tregonwell v. Sydenham, 3 Dow. 194; Cook v. Stationers' Co., 2 Myl & K. 262; Paige v. Leapingwell, 18 Ves. 463; Lemon v. People, 6 Ired. Eq. 137; Stevens v. Ely, 1 Dev. Eq. 493, etc.; and (3) When a trust is too uncertain, indefinite and vague to be carried into effect." Citing authorities.

Resulting trusts are those which are implied by law, in conformity with the presumed intent of the parties from the nature and character of their transactions. The Modern Law of Real Property, sec. 93.

See, also: Tiedman on Real Property, sec. 499, and Modern L. of R. P. sec. 109.

A conveyance with the understanding that the grantee, in assuming title and control of the property with discretion as to a sale, is to pay out of his own means obligations of the grantor, and, after sale and satisfaction of debts, to share with him the excess, if any, creates a trust and not a mortgage. Flagg v. Walker, 113 U. S. 659.

A trust is where there are interests distinct from legal ownership. Seymour v. Freer, 8 Wall. 213; Wallace v. Wainwright, 87 Pa. 263.

When agent takes title in his own name he holds as trustee of a resulting trust for his principal (Irvine v. Marshall, 20 How. 561-563; Sanford v. Sanford, 139 U. S. 646; Brainerd v. Buck, 184 U. S. 105); and in case he takes title from his principal, but only to facilitate conveyance to such purchasers as he may find in accordance with the duties of his agency, an application of the same

principle would raise a resulting trust in favor of his principal upon his failure to find such purchasers and his abandonment of his agency without selling the property.

Resulting trust was held to arise in the following case which, also, appears to be in point here:

Wood v. Perkins (C. C.) 57 Fed. 258;

Also, see: Neale v. Hagthrop, 3 Bland. 551.

This deed was not intended to do more than invest the grantees with the legal title for the sole purpose of conveying the lots to other persons in the course of their agency in this regard; and, if it can have the effect of passing the legal title, a resulting trust must certainly arise under the facts in the case.

An error into which counsel for appellants have fallen in arguing this, as well as the other assignments, is the assumption that the deed actually conveyed and passed title at the time it was executed; but, if such had been the case, the relationship of principal and agent thereby created would not be impaired by the fact.

II.

Referring to the third assignment of error and answering the argument of counsel for appellants in support of the same,

It is conceded that, as a general rule, "the return to the grantor or destruction of a deed to land will not revest grantor with title," although in the text of 9 Am. & Eng. Enc. L. (sec. ed.) 1164, citing a number of cases in note thereto, it is stated that "this rule is, however, in effect, denied in Maine, Massachusetts and New Hampshire, where it is held that where the grantee, without mistake or fraud and in pursuance of a fair agreement, redelivers the deed to the grantor, he is estopped as

against the grantor, his heirs and assigns, from asserting title," and, in 2 Supplement to same 397, text 164, note 2, Shepley v. Ledig, 189 Ill. 197, and Patterson v. Carson (Tenn. Ch. 1898), 48 S. W. Rep. 383 are cited as holding that redelivery creates estoppel.

That "the setting up of an estoppel by deed may be prevented by an estoppel in pais as against the grantee," appears to be well established.

11 Am. & Eng. Enc. L. (sec. ed.) 392;

Platt v. Squire, 12 Met. (Mass.) 494;

Haney v. Roy, 54 Mich. 635.

The same principle appears to have been applied in the case of Boynton v. Haggart (C. C. A.) 120 Fed. Rep. 819, where an estoppel by judgment was allowed against an estoppel by deed.

Under the recording acts of Wisconsin, where parties destroyed unrecorded deed, it is inoperative against a purchaser for value, without notice. Parker v. Kane, 63 U. S. (22 How. 16) 1.

"After the redelivery of the deed to the grantor, and the unequivocal acts of abandonment on the part of the grantee of the contract,—as here, to support the grantor, etc.,—which formed its consideration, equity will cancel the deed as a cloud on title." Huffman v. Huffman, 69 Tenn. (1 Lea) 491, as cited in sec. 551, column 739, Vol. 16 Am. Dig., Century Edition.

"Only the equitable and not the legal title passes under an unregistered deed, and the contract may be rescinded by the parties by the redelivery of the deed and return of the consideration" (Davis v. Inscoe, 84 N. C. 396); and "the surrender of an unrecorded deed restores the legal title to the vendor as between the parties, where no intervening interests have attached." Austin v. King, 91 N. C. 286; and Fortune v. Watkins, 94 N. C. 304, as cited id.

"Where the grantee in an unrecorded deed surrenders to the grantor his interest in the land, and returns the deed, the grantor is thereby invested with such an equitable interest as will be a good defense to a suit by the grantee to establish title." Happ v. Happ, 156 Ill. 183, 41 N. E. 39, and, to the same effect, Fitch v. Conyne, 65 Ill. 83, as cited id.

The record of the deed here is back of the patent from the United States, the original source of title, and would not be notice to innocent purchasers from H. C. Sweet or his vendees since Oct. 13, 1898; and such a record does not appear to be any insuperable obstacle to the recision of the entire contract by the acts of the parties in returning the deed and abandoning the purpose for which it was made, even though the deed had passed title.

But here the grantees surrendered the deed and abandoned the contract about seven years before it could have had the effect of passing title to them, by way of estoppel upon which they now rely; and, in view of the status of Greer County lands at the time, this deed cannot be considered as more than an executory contract in respect to the title to the lots.

That the grantees could take title only by way of estoppel, is incontestable; and the general rule is that "if a grantor having no title, a defective title, or an estate less than that which he has assumed to grant, conveys with warranty, or covenants of like import, and subsequently acquires the title or estate which he purported to convey, or perfects his title, such after acquired title will inure to the grantee or to his benefit, by way of estoppel. 16 Cyc. 689, citing, among a number of cases. Stone v. Sledge, 87 Tex. 49, and Lindsay v. Freeman, 83 Tex. 259.

To the same effect are:

Terret v. Taylor, 9 Cranch 53;

Barry v. Gratz, 4 Wheat. 222;

Bush v. Marshall, 6 How. 291;

Irvine v. Irvine, 9 Wall. 625;

Meyers v. Croft, 80 U. S. (13 Wall.) 291;

Moore v. Crawford, 130 U. S. 131;

Ryan v. United States, 136 U. S. 68;

Falks v. Kamp (C. C.), 3 Fed. 898;

Curran v. Bardsall (D. C.), 20 Fed. 835;

Crawford v. Moore (C. C.), 28 Fed. 824.

The ground upon which the doctrine is usually based is the prevention of circuity of action (11 Am. & Eng. Enc. L. 405, and notes thereto); and it appears that this estoppel should not be allowed in a case in which the facts would defeat an action by the grantees for breach of warranty, certainly not to effect such an inequitable and unjust end as that for which it is invoked by appellants here, where, instead of preventing a fraud upon the grantees, it would operate so as to effect a fraud upon the grantors and those claiming under him since he obtained his patent from the United States.

That the deed was invalid and that, for this reason, the covenant of warranty cannot work an estoppel against the subsequently acquired title of H. C. Sweet appears clear, in view of the laws of both the United States and the State of Texas relating thereto.

United States v. Texas, 162 U. S. 1;

Acts of Congress relating to Greer County, approved May 2, 1890, and Jan. 18, 1897, respectively;

Day Land and Cattle Co. v. State, 68 Tex. 526.

On Dec. 30, 1887, the President issued a proclamation asserting jurisdiction over the county to be in the United States, asserting that said county was a portion of the Indian Territory, and admonishing and warning "all persons, whether claiming to act as officers of the County of Greer, in the State of Texas, or otherwise, against selling or disposing of, or attempting to sell or dispose of, any of said lands or from exercising or attempting to exercise any authority over said lands."

Messages and Papers of the Presidents, Vol. 8, pp. 740-1.

A deed acknowledged before a grantee is invalid.

Brown v. Moore, 38 Tex. 646.

Such a deed is not entitled to record, and its record is of no effect.

Heintz v. O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

A void conveyance cannot work an estoppel against a title subsequently acquired by either party thereto.

Harkness v. Underhill, 66 U. S. (1 Black) 316;

Powell v. Patterson, 100 Cal. 236, 34 Pac. 677.

An invalid deed creates no estoppel.

Faulk v. Calloway, 123 Ala. 325;

Van Dyke v. Van Dyke, 119 Ga. 830;

Altemus v. Nichols (Ky. 1903), 74 S. W. Rep. 221;

Smith v. Ingram, 130 N. C. 100.

The rule that, where a vendor has not title and sells, any title afterwards procured by him will inure to the benefit of the purchaser, does not apply in cases in which such sale was prohibited by law, as in the case of a sale of public lands so prohibited.

Atkinson v. Bell, 18 Tex. 474;

Holmes v. Johns, 56 Tex. 41.

While it is true that courts have generally refused to cancel instruments void up their faces, their power to cancel them does not appear to be denied; and, in the case of the Day Land and Cattle Co. v. The State of Texas, hereinbefore cited, the Court cancelled patents to lands in Greer County upon the ground of their invalidity, the rule appearing to be that "the setting aside and cancellation of void instruments by courts of equity is a matter of discretion in the court, and not of absolute right in the parties asking the cancellation."

Hamilton v. Cummings, 1 Johns. Ch. 517;

Porter v. Jones, 46 Tenn. (6 Cold.) 313;

Also, see: Hays v. Hays, 2 Ind. (2 Cart.) 28, as holding that equity will cancel instrument void on its face.

There appears to be no question but that equity will cancel a void instrument when the fact of its being void is not apparent on its face.

Bunce v. Gallagher, Fed. Cas. No. 2,133 (5 Blatchf. 481).

III.

Referring to fourth and sixth assignments of error

and answering argument of counsel for appellants in support of the same,

The "mere failure of the consideration named in a deed cannot be shown for the purpose of defeating the conveyance," is a proposition urged by counsel for appellants and, notwithstanding cases to the contrary, this is conceded to be the general rule; but the rule is not applicable to the case here, where it is not the "mere failure of consideration," nor the defeat of the conveyance, that is involved, the character and purpose of the conveyance and the failure of such purpose being the question here.

The fact that there was no consideration for a deed may be shown; but not by the grantor to defeat the operation of a deed, is the language of 3 Enc. of Ev. 375; and, as supporting the proposition that such want of consideration may be shown, the following cases are there cited:

Renshaw v. First National Bank (Tenn.), 63 S. W. 195;

Ewing v. Wilson, 132 Ind. 223, 31 N. E. 64;

Grosbeck v. Seeley, 13 Mich. 329;

Lyford v. Thurston, 16 N. H. 399;

and, as being contrary to the qualifying statement that it cannot be done by the grantor to defeat the operation of the deed, the following cases are there cited:

Hebbard v. Hughian, 70 N. Y. 54;

Eckler v. Alden, 125 Mich. 215, 84 N. W. 141.

The true doctrine appears to be that "as between the parties and those claiming under them a deed cannot be impeached on the ***sole*** ground of a want of consideration. But an executory agreement or an imperfect con-

veyance, without a valid or meritorious consideration, will not be enforced in equity against the promisor or grantor or his personal representative or subsequent voluntary grantees; and, *a fortiori*, it will not be enforced against subsequent grantees for a valuable consideration."

13 Cyc. 534-535, citing

Burton v. Leroy, 4 Fed. Cas. No. 2,217.

Article 272, Title XII, Revised Statutes of Texas, of 1897, in force at the time of the execution of the deed, provides that want or failure or partial failure of consideration for any instrument in writing is a sufficient defense against any action on the same; and it would appear that the spirit of this statute would permit the want of consideration to be shown as against an estoppel urged upon the ground of a warranty in a deed that passed no title at the time it was executed, especially where the grantor retained possession of the property, as here; but, be the effect of this statute what it may, this case is not within the inhibition of the rule urged by counsel for appellants and the court below is not in error in this regard:

Beaumont Car Works v. Beaumont Imp. Co., 4 Tex. Civ. App. 257;

Wigmore on Evidence, sec. 2437;

Ames Cases on Trusts, 1st ed., pp. 291, 295-330;

Horner v. Chicago, M. & St. P. Ry. Co., 38 Wis. 165;

Andrews v. Andrews, 12 Ind. 348;

Ewing v. Wilson, 132 Ind. 223;

Same v. Justice, 132 Ind. 600;

Same v. Fernold, id.;

Bryson v. Bryson, 75 Cal. 525;

Kerr v. Calvit, 1 Miss. (Walk.) 115.

Here, the proof of want of consideration was not for the "sole" purpose of defeating the operation of the deed; but it was a part of the evidence showing the agency and trust character of the deed and the subsequent resulting trust.

IV.

Referring to fifth assignment of error and answering argument of counsel for appellants in support of the same,

The evidence was ample to justify the trial court in finding and the Supreme Court of Oklahoma in approving the finding that no part of the $10, mentioned in the deed as the consideration, was paid; and it must be presumed that the trial court so found and the Supreme Court of Oklahoma so approved.

9 Enc. of Ev. 937, citing cases.

For the reasons hereinbefore stated, I respectfully submit that there was no error in the judgment of the court below and that the same should be affirmed.

CHARLES M. THACKER,
For Appellees.

Office Supreme Court, U. S.
FILED.
FEB 15 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 156.

J. G. BOGARD ET AL., APPELLANTS,

vs.

F. H. SWEET ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLEES.

CHARLES M. THACKER,
For Appellees.

(20,461.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 156.

J. G. BOGARD ET AL., APPELLANTS,

vs.

F. H. SWEET ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLEES.

Statement.

The statement in the main brief for appellees appears to admit of no qualification and of but little amplification, but of the latter nature the following is respectfully submitted:

The fact that the contemporaneous written undertaking of the grantees is dated December 10, 1890, and refers to the deed as being of the same date, while the purchase of the "Mangum Star" was on or before November 22, 1890, and the fact that neither the deed nor undertaking of grantees makes any reference to said purchase of the newspaper tend strongly to show absence of connection between said purchase and the consideration for the deed; but the fact that the purchase of the newspaper was no part of the considera-

tion for the deed is also proven by the parole evidence (R., pp. 34, 35, and 55); and that the deed was without consideration, other than the "particular objects and purposes" stated in the main brief, is here emphasized.

The facts that the deed of the grantors and the said undertaking of the grantees were dated, in the latter, on December 10, 1890; that the latter was not acknowledged until on December 13, 1890, and the former on February 10, 1891; that the deed was not recorded until June 24, 1891, to which record reference is made in said undertaking, and that the names of some of the orginal parties were, after these instruments were prepared, stricken therefrom suggest a question as to whether the deed was ever effectively delivered and accepted, and as to whether changes in parties corresponded with transfers of shares of stock in the Association.

In connection with the statement that of the nine members of the Association, including two deceased ones here by representation, who are the appellants, the names of only seven, or, excluding the two deceased, only five are found in the consideration and warranty clauses of the deed, the record here showing only four of said seven and only three of said five in the warranty clause, it may be noted that while one of said two deceased, being also one of said four in said warranty clause, is here as an appellant by representation, W. L. Pendergraft, as his sole devisee and legatee, filed disclaimer herein with the other nine disclaimers. Although the proof in this record is not very satisfactory, the grantors occupied the lots as a homestead at the time of making the deed.

ARGUMENT.

I.

Referring to first and second assignments of error and further answering argument of counsel for appellants in support of same:

In the main brief for appellees some of the cases were cited upon the authority of encyclopedias and digests, as there indicated; but, subsequent examination of practically all of such cases having been made, it is found that all such cited under this subdivision of the argument are correctly cited.

In the case of Reeves *v.* Bass, 39 Tex., 619, cited on page 11 of the main brief, it is held that parole evidence was admissible to show that a conveyance was in trust for the grantor, who was to have the use and control of the property during his life, and that the deed was to operate as a testamentary devise at his death.

The trust character of the deed is clearly shown by the contemporaneous written undertaking of the grantees; and this character is also shown by parole evidence.

That "parole evidence is admissible to show the purpose for which an instrument was executed, and that its design and object were different from what its language, if alone considered, would indicate," is the language of 21 Am. & Eng. Enc. L. (sec. ed.), 1111, citing cases from twenty-six States.

That "parole evidence is admissible to show that a deed conveying the property was intended to creat a trust in the grantee" is the language of 9 Enc. of Ev., 443, citing, besides English cases, cases from 14 States, including the following, which have been examined and, being Texas cases, are deemed of special interest in determining the rights of

the parties under a deed presumably made in deference to the laws of that State:

Meade *v.* Randolph, 8 Tex., 191.

Barnett *v.* Houston, 18 Tex. Civ. App., 134; 44 S. W., 689.

Smith *v.* Eckford, 18 S. W., 210.

Black *v.* Caviness, 2 Tex. Civ. App., 118; 21 S. W., 635.

Also, see Collar *v.* Collar, 75 Mich., 414; 42 N. W., 847.

Clark *v.* Haney, 62 Tex., 511; 50 Am. Rep., 536.

In Meade *v.* Randolph, *supra*, it is held that—

"Parole evidence is admissible to prove that a deed or instrument absolute on its face was executed and delivered upon certain trusts not reduced to writing, and which the grantee promised to perform; and this may be established."

The above case is peculiarly interesting and instructive in this connection; and, among other things, it is stated in the opinion that—

"The declaration or creation of trusts stands in this State as it did at common law in England before the passage of the statute of frauds and purjuries. The subject was considered in the case of James Fulcrod, decided at Galveston, January term, 1851 (5 Tex. R., 512), and it was there held that the only contract in relation to lands which was required to be in writing by the statute of frauds and fraudulent conveyances was the contract for their sale; and that express trusts in relation to lands stand upon the same footing with implied or constructive trusts; that the facts from which resulting trusts arise and the special contracts by which express trusts are created may alike be proved by parole evidence."

The other Texas cases cited *supra* are in line with Meade *v.* Randolph; and in Barnett *v.* Houston, *supra*, it is said:

"That a deed absolute upon its face may be shown to have been intended to be held by the grantor in subordination

to a use or trust, and so enforced by a court of equity, is not disputed (Cook *v.* Cook, 77 Tex., 85; 13 S. W., 847). If Elizabeth Barnett had provided that, after the use to which the deed was to be applied, the land, or what remained of it, should be returned to her, there is no doubt that she could have enforced the return of it, or the remainder of it; and we can see no reason why she could not have provided that the residue should go to some one else. The evidence was sufficient to authorize a finding in favor of the parole trust alleged."

In Collar *v.* Collar, *supra*, a Michigan case, it is held that—

"When cotenants join in conveying land to a person under a verbal agreement that he shall sell it and pay to each cotenant his share of the proceeds, the trust may be proved, by parole evidence, in an action by one of the cotenants against the grantee to recover his share of the proceeds as money had and received."

According to notes to 6 L. R. A., 47, in the following cases it is held as follows:

"Oral or written testimony showing the circumstances of a transaction and the intention of the parties is admissible to prove or disprove an implied trust (Moore *v.* Stinson, 4 New Eng. Rep., 654; 144 Mass., 594)."

"Or resulting trusts (*ibid.;* Beck *v.* Beck, 8 Cent. Rep., 548; 43 N. J. Eq., 39; Jackson *v.* Jackson (Pa.), 7 Cent. Rep., 850)."

"Or to show that the grantee in an absolute conveyance agreed to hold the land in trust for the grantor's benefit (Morrall *v.* Waterson, 7 Kan., 199)."

"Or to show that an unwritten declaration of trust was made contemporaneously with the making of the title under which it is declared (McVay *v.* McVay, 8 Cent. Rep., 596; 43 N. J. Eq., 47)."

According to notes to 10 L. R. A., 401, in the following cases it is held as follows:

"A resulting trust may be established by parole evidence; but such evidence must be clear and unequivocal (Walter *v.*

Snowden (Pa.), 6 Cent. Rep., 731; Bates *v.* Kelly, 80 Ala., 142; Reynolds *v.* Coldwell, *id.*, 132; Philpot *v.* Penn, 8 West. Rep., 266; 91 Mo., 38; Jackson *v.* Wood, 3 West. Rep., 795; 88 Mo., 76; Shaw *v.* Shaw, 3 West. Rep., 254; 86 Mo., 594; Bibb *v.* Hunter, 79 Ala., 351; Botsford *v.* Burr, 2 Johns. Ch., 409; 1 N. Y. Ch., L. Ed., 430; Gillespie *v.* Moon, 2 Johns. Ch., 601; 1 N. Y. Ch., L. Ed., 507; Collins *v.* Collins, 6 Lans., 371; Loundsburry *v.* Purdy, 16 Barb., 376, 382; McCartney *v.* Bostwick, 32 N. Y., 59; Fluharty *v.* Beatty, 4 W. Va., 521; U. S. Bank *v.* Carrington, 7 Leigh, 566; Swinburn *v.* Swinburn, 28 N. Y., 568; Chester *v.* Bank of Kingston, 16 N. Y., 336; Reid *v.* Fitch, 11 Barb., 399)."

According to notes to 20 L. R. A., 108-109, "in an action by the grantor to set aside the deed," in the following cases it is held as follows:

"But parole evidence is allowable that no consideration was paid for a deed defectively executed by not being sealed, for the purpose of destroying its effect and preventing an enforcement of the sale (Hanson *v.* Micholson, 19 Wis., 499)."

"In Brown *v.* Brown, 106 Mo., 611, parole evidence was admitted without objection at the trial that no consideration was paid for a deed, and on appeal it was held that the evidence was proper for the purpose of showing adverse possession by the grantor, after giving the deed."

"In an action to cancel for non-performance by the grantee of his agreement a deed reciting one dollar and other good and valuable considerations, parole evidence may be given that the actual consideration was the grantee's promise to do certain things, and the benefit the grantor expected to realize therefrom (Piedmont Land and Improvement Co. *v.* Piedmont Foundry and Mach. Co. (Ala.), June 9, 1892)."

"Also that no consideration passed for a deed reciting one of $4,000.00, and that the grantee was a mere conduit for transferring the title to a third person in trust for the grantor's wife, and where the plaintiff, in his petition to set aside the deed, alleges that no consideration has passed,

he cannot rely upon the inadequacy of the consideration expressed in the deed (Hollocher *v.* Hollocher, 62 Mo., 267)."

The following additional cases, cited under another subdivision in the main brief, are also here cited as holding that the trust may be shown by parole and the expressed consideration disproved:

Renshaw *v.* First National Bank (Tenn.), 63 S. W., 195.
Ewing *v.* Wilson, 132 Ind., 223; 31 N. E., 64.
Lyford *v.* Thurston, 16 N. H., 399.
Grosbeck *v.* Seely, 13 Mich., 329.

It is in the nature of a fraud for one to whom land is conveyed as trustee to deny the fact that the land was so conveyed and to claim it for himself (Rochefoucauld *v.* Boustead (1897), 1 Ch., 196; 66 L. J. Ch., 74, 75; L. T. N. S., 502; also see Brison *v.* Brison, 75 Col., 525; 7 Am. St. Rep., 189).

The correct rule, as stated in 28 Am. & Eng. Enc. L., 910 (sec. ed.), is as follows:

"*Trusts Established in Equity to Prevent Fraud.*—Whenever the title to real or personal property, or a profit therefrom, is obtained by one person under such circumstances as would render his retention of such title or profit an actual or constructive fraud on another who in justice and right is entitled thereto, equity, in order to satisfy the demands of justice, will consider the subject-matter as impressed with a trust in favor of him who is beneficially entitled, enforceable against the holder of the legal title or any one claiming under him voluntarily or with notice" (citing many cases, among which are Moore *v.* Crawford, 130 U. S., 128, and Keech *v.* Sanford, 1 White and T. Lead. Cas. (6th ed.), 53, and notes).

In a case like this, in an action by the grantor against the grantee to set aside the deed, there is a line of cases holding that the grantor will not be permitted to contradict by parole evidence the recital in the deed of consideration therefor for

the purpose of engrafting a trust upon the conveyance, where the deed is absolute and is perfectly executed and delivered and there is neither other writing between the parties nor extraneous matters militating against or affecting the character of the conveyance; but in this case the deed and contemporaneous written undertaking of the grantees, with their imperfections and the extraneous facts in respect to the status of the lands of Greer county at the time and the confidential relations existing between H. C. Sweet and the other parties as partners in the association and joint grantees in the deed, clearly take this case out of the rule applied in those cases; and there is a strong line of cases, permitting impeachment of the consideration for such purpose, although it is not conceded that impeachment of the recited consideration is necessary to engraft a trust upon an absolute deed.

The deed and contemporaneous written undertaking of the grantees, considered together without the aid of parole evidence, create an express trust, which, upon the failure of the grantees to sell the lots, was followed by an implied or express trust in favor of the grantor; but, if the deed was absolute and there was no such writing, the principles followed by the courts in the foregoing cases justify the finding of such a trust in the parole evidence itself.

The court below certainly did not err in any respect vulnerable to appellants' first and second assignments of error.

II.

Referring to third assignment of error and further answering argument of counsel for appellants in support of same:

The case of Shepley *v.* Ledig, 189 Ill., 197, cited on page 14 of main brief upon the authority of the Am. & Eng. Enc. of L. (Supplement to sec. ed.), is found to be not in point and erroneously cited; but the other cases cited upon the

authority of encyclopedias and digests are in point and correctly cited.

On page 17 of the main brief, however, it is erroneously stated that "a deed acknowledged before a grantee is invalid," and that statement is here corrected to read as follows: An acknowledgment before a grantee in a deed is invalid; and, in the State of Texas, where the acknowledgment by the wife is essential to convey a homestead, by reason of article 636, title 20, Sayles' Texas Civ. Statutes, the deed itself is invalid to convey a homestead. Besides case of Brown *v.* Moon, 38 Texas, 646, cited in this connection in main brief, see the following:

Hogans *v.* Carruth, 18 Fla., 587.
Wason *v.* Connor, 54 Miss., 351.
Jones *v.* Porter, 59 Miss., 628.
Green *v.* Abraham, 43 Ark., 420.
Wilson *v.* Traer, 20 Ia., 231.
Hamners *v.* Dale, 61 Ill., 307.
West *v.* Krebaum, 88 Ill., 263.
Stevens *v.* Hampton, 46 Mo., 404.
Dail *v.* Moore, 51 Mo., 589.
Grosbeck *v.* Seeley, 13 Mich., 329.
Davis *v.* Beazley, 75 Va., 491.
Withers *v.* Baird, 7 Wats (Pa.), 227.

That the lots must be regarded as the homestead of the grantors, without regard to whether Sweet had the title thereto, if the grantors occupied them as such, so that a valid deed must have been properly acknowledged, appears:

Wheaton *v.* Griffin, 60 Tex., 209.
Morris *v.* Geisecke, 60 Tex., 633.
15 Am. & Eng. Enc. L. (sec. ed.), 668.

At common law a deed was void unless the grantor was seized of the land (Small *v.* Proctor, 15 Mass., 495; 4 Done's Abr., 16, and Washburn on Real Property, vol. 1, p. 67),

and a covenant of warranty will not run with the land so as to estop the grantor from setting up after-acquired title when he was seized neither of the title nor the possession at the time of making his deed (3 Washburn on Real Property, p. 159); and the alternative of regarding the lots as of the homestead or the grantors lacking in both title and possession suggests itself.

The deed was invalid, both because forbidden by law and because not acknowledged before a person other than a grantee, and no estoppel of warranty can arise from such a deed; but, if this were not so, the appellants are clearly estopped by their acts to assert title.

The estoppel *in pais* here urged against the appellants is peculiarly strong.

In 1891 they abandoned the purpose for which the deed was made without having taken possession of the property or done any act of consequence so much as indicating acceptance of the grant. The custodian of the deed returned it to the grantor as a final token of the rescission and cancellation of the entire contract in 1891. The appellants and other grantees at least quietly acquiesced in the action of the custodian of the deed in this regard and, without any act indicating claim of right under it, permitted the grantor to continue his possession of the property, and in October, 1888, to acquire title by patent from the United States, at the expense of exhausting his rights under the act of Congress of January 18, 1897, in entries that included, instead of excluding, the lots of the deed. After a silence of more than nine years, during which time the changes incident to the growth of a village into a town of considerable local importance occurred, without thought of such deed, the appellants call attention to the existence of the record of the deed, and when this action is brought to cancel it, assert title by estoppel by virtue of the warranty; and at the trial in the district court, about twelve years after the surrender of the deed to H. C. Sweet, the only ones—three—who testify in

their behalf admit to have done no act, except the resistance of the action, indicative of or consistent with their claim of title.

Are they not estopped to assert title in themselves in the light of these facts?

Besides the authorities cited in the main brief in support of the estoppel *in pais* here urged, attention is asked to the case of Chippewa Lumber Company *v.* Tremper, 75 Mich., 36, where it is held that, in an action for breach of a covenant not to engage in the sale of liquors, the rejection of evidence to show that plaintiff's sole business manager was interested in a drug company which he knew was selling liquor in the town in question, in violation of a like covenant to plaintiff, was held error.

III.

Referring to fourth and sixth assignments of error and further answering argument of counsel for appellants in support of same:

The cases cited upon authority of 3 Enc. of Ev., 375, at page 19 of the main brief, are correctly cited and appear to be very valuable cases in this connection; but Hebbard *v.* Hugian, 70 N. Y., 54, does not so strongly as Eckler *v.* Alden, 125 Mich., 215, support the proposition upon which they are there cited.

In 6 Cyc., 286, it is stated that—

"A contract or conveyance which is improvident or based on an inadequate consideration will not be set aside for these reasons alone, unless, as the rule is generally stated, the improvidence or inadequacy is so great as to furnish of itself convincing evidence of fraud." * * *

While want of consideration, inadequacy of consideration, or failure of consideration, in case of perfect and absolute deed reciting a consideration and conveying the prop-

erty, when standing alone, according to many authorities, is not ground for setting aside the deed, either of these facts may be governed by circumstances which justify setting it aside:

McClelland *v.* McClelland, 176 Ill., 83; 51 N. E., 559.
Bevins *v.* Keen, 64 S. W., 428; 23 Ky. L. Rep., 757.
Payett *v.* Ferrier, 20 Wash., 479; 55 Pac., 629.
Lockwood *v.* Lockwood, 124 Mich., 627; 83 N. W., 613.
Pironi *v.* Corrigan, 47 N. J. Eq., 135; 20 Atl., 218.
Hollingshead *v.* McKenzey, 8 Ga., 457.
Dickinson *v.* Dickinson, 24 Neb., 530; 39 N. W., 429.
Vincent *v.* Walker, 93 Ala., 165; 9 Southern, 382.
Steele *v.* Richardson, 24 Ark., 365.
Jackson *v.* Sebring, 16 Johns., 515; 8 Am. Dec., 357.
Life Ins. Trust Co. *v.* Cole, 4 Fla., 359.

In the case of Fowlkes *v.* Lea, 84 Miss., 509; 68 L. R. A., 925, apparently a well-considered case, the court, referring to the acknowledgment of receipt of consideration in the deed, said:

"But this acknowledgment of payment is, in effect, merely a receipt, and may be contradicted by parole. It was contradicted by parole in this case."

For the reasons stated in the main brief, as supplemented by this, it is respectfully submitted that the judgment of the court below should be affirmed.

CHARLES M. THACKER,
For Appellees.